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PERSPECTIVE

The future of DACA is far from clear

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In June, the U.S. Supreme Court upheld the Deferred Action Childhood Arrivals program, striking down the Trump administration's attempt to end it. Despite this historic victory at the Supreme Court, the future of the program and the fate of over 700,000 DACA recipients — popularly known as Dreamers — remain uncertain. Unfortunately, that uncertainty has only increased with the administration's recent directive that has curtailed certain aspects of DACA pending its full consideration.

Despite the administration's recent action altering DACA, the Supreme Court's decision lays down important rules the administration must follow. It requires the administration to take into account the profound reliance on DACA by hundreds of thousands of people, their families, employers and communities, and requires the administration to "turn square corners" by following the requirements of the Administrative Procedure Act.

The only way to permanently protect the Dreamers is for Congress to enact legislation providing for a path to citizenship. But in the absence of a congressional solution, the Supreme Court's decision sets important limits on the Trump administration while it considers its course of action. In that way, the court's decision enforcing and upholding the rule of law will help guard the Dreamers' fate.

Background

The road to the Supreme Court began over eight years ago when the Obama administration announced DACA. In response to congressional inaction, DACA sought to "lift the shadow of deportation" from those young people who arrived in the United States as children. The program imposed

stringent requirements, but once satisfied, a Dreamer would receive two years of protection from deportation, and the opportunity to apply for work authorization and a driver's license, among other benefits. Since its creation, DACA has been immensely successful. Dreamers have made, and continue to make, countless contributions to their families, communities and the nation. By way of example, among our clients are doctors, lawyers, teachers and students. Dreamers' contributions to the economy are incredible — they pay \$5.7 billion in federal taxes and \$3.1 billion in state and local taxes annually, and contribute more than \$42 billion to the annual GDP. If that were not enough, over 200,000 Dreamers have rushed to help the nation confront the global pandemic.

Notwithstanding these successes and DACA's broad public support, the Trump administration abruptly terminated the program in September 2017. The then-acting secretary of the Department of Homeland Security claimed that it was "clear" DACA should be "terminated" in light of a letter from then-Attorney General Jefferson B. Sessions, and court rulings about a separate program — Deferred Action for Parents of Americans. DHS's rescission of the program was immediately challenged all over the country, including California, New York, Maryland and Washington, D.C.

Our firm and others brought suit on behalf of the Dreamers. In the main, we argued that DHS's decision to terminate DACA violated core principles of administrative law set forth in the APA. Among these include requirements imposed on federal administrative agencies — like DHS — "to engage in 'reasoned decisionmaking.'" *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359,

374 (1998)). The requirement of "reasoned decisionmaking" enables the public to hold their government accountable and allows the courts to review agency action. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). When federal agencies do not comply with this basic requirement, the APA requires courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. Section 706(2)(A). Indeed, when an agency fails to consider "the relevant factors" or "provide even [a] minimal level of analysis," its action is deemed "arbitrary and capricious" under the APA, which means it "cannot carry the force of law." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

Our argument particularly focused on requirements imposed on an agency when it seeks to change a policy or a prior position. It is a fundamental principle of administrative law that an agency can change existing policies. But changing an existing policy does not absolve an agency from providing a "reasoned explanation for the change," *Encino Motorcars*, 136 S. Ct. at 2125, that "can be scrutinized by courts and the interested public." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). Those tenets apply with special force when an agency seeks to alter "longstanding policies" that have "engendered serious reliance interests" — like, DACA. *Encino Motorcars*, 136 S. Ct. at 2126. In such circumstances, an agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Id.* at 2125. It must "pay[] attention to the advantages and the disadvantages of agency decisions." *Michigan*, 135 S. Ct. at 2707. Indeed, an agency owes a "basic duty under the [APA] to consider all of the relevant factors,

including the costs," and to assess whether a "proposed action would do more good than harm." *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 734 (D.C. Cir. 2016) (Kavanaugh, J., dissenting). Performing this cost-benefit analysis is both "common administrative practice and common sense." *Id.* at 733.

Against this legal backdrop, the district court found that the Dreamers were likely to succeed on their APA claim, and issued the first nationwide injunction preventing the rescission from taking immediate effect. The 9th U.S. Circuit Court of Appeals affirmed the district court's decision, and the Supreme Court granted certiorari to review the 9th Circuit's decision, along with cases pending in Washington, D.C. and New York.

The Supreme Court

In a 5-4 decision, the Supreme Court ruled for the Dreamers. Chief Justice John Roberts penned the majority opinion, holding that DHS's rescission violated the APA in two ways. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1910-15 (2020). First, the court explained that DACA consists of two components — forbearance and benefits, such as work authorization — and DHS "offer[ed] no reason for terminating ... forbearance," the "defining feature" of DACA. DHS, the court concluded, could not rescind the program in full "without any consideration whatsoever" of a forbearance-only policy." Second, the court found that DHS "failed to address whether there was 'legitimate reliance'" on DACA. On this point, the court pointed to the profound reliance interests described in respondents' briefs and dozens of amicus briefs. The court noted that the respondents and amici stressed how "since 2012, DACA recipients have 'enrolled in degree programs, embarked on careers, started busi-

nesses, purchased homes, and even married and had children, all in reliance' on the DACA program." The "consequences of the rescission" would "'radiate outward' to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them." The agency could have determined "that other interests and policy concerns outweigh any reliance interests" but "[m]aking that difficult decision was the agency's job," and the agency "failed to do it."

The Supreme Court's decision was a momentous victory for the Dreamers, but it was also one for the rule of law. It emphasized the APA's procedural requirements, "by which federal agencies are accountable to the public and their actions subject to review by the courts." *Regents*, 140 S. Ct. at 1905. The court made clear that our government must "'turn square corners in dealing with people'" particularly when "so much is at stake."

Future of DACA

Despite the Supreme Court's decision, the future of DACA is far from clear. The Supreme Court's decision reinstated DACA in full, requiring DHS to begin accepting new applications and to reinstate key features of the program, such as the ability to apply for advance parole, i.e., permission to travel abroad for work and to visit family. The Supreme Court's decision further secured the Dreamers' victory in the lower courts that had permitted DACA recipients to renew their DACA applications during the more than two year period since DHS announced its decision to terminate the program.

Weeks after the Supreme Court's decision, the Trump administration issued a memorandum curtailing the Dreamers' victory. In that memorandum, Acting Secretary of Homeland Security Chad F. Wolf directed "immediate changes to the DACA policy to facilitate [his] thorough consideration of how to address DACA in light

of the Supreme Court's decision." Those changes included halting the acceptance of new applications for DACA and for advance parole, and shortening the time of forbearance afforded to current DACA recipients from two years to one. The agency claims to be considering DACA "anew," yet asserts that the program "present[s] serious policy concerns that warrant its full rescission." In particular, Wolf raised concerns that congressional inaction casts "serious doubts" on whether DHS should continue the program; that discretion is not being properly exercised on an individualized basis; and that DACA sends "mixed messages" that may "contribute to the general problem of illegal immigration," including in "the context of children."

As many defenders of DACA consider this new directive, its immediate effect increases doubt and uncertainty for the Dreamers, their families, their communities, and the public that broadly supports the program. The future of DACA essentially depends on whether the Trump administration will seriously engage in a "thorough consideration" of DACA. This, in the very least, means adherence to the requirements the Supreme Court articulated. In particular, any future change to DACA must reckon with the fact that hundreds of thousands of people have relied on it, and the fact that it is a tremendous benefit to their lives and families, the economy, and the country as a whole.

In a recent interview, President Donald Trump claimed that the "Supreme Court gave the president of the United States powers that nobody thought the president had, by approving, by doing what they did — their decision on DACA." To be clear, the Supreme Court's decision did nothing of the sort. As Justice Brett Kavanaugh explained in a separate opinion, the "Executive Branch's exercise of [its] rescission authority is subject to constitutional constraints and may also be subject to statutory constraints." The dispute

before the court highlighted a "statutory constraint — namely, whether the Executive Branch's action to rescind DACA satisfied the general arbitrary-and-capricious standard" of the APA. The judiciary always stands ready to answer that question, ensuring that the executive considers and clearly explains the consequences of new approaches, especially for those who will be profoundly affected by a change. The Supreme Court's decision demonstrates how powerful the APA can be to restrain the executive's power, not augment it. The administration's recent directive is no exception — if challenged, it will be scrutinized under the lens of the APA.

Dreamers, and the activists and attorneys who support them, have raised concerns that the Supreme Court offered the Trump administration a roadmap on how to terminate the program under the APA. Indeed, the Supreme Court walked through the legal defects of the rescission. But the Supreme Court did make clear that the Trump administration is not above the rule of law, and must explain its reasoning to a skeptical public if it tries to rescind DACA in full. A stroke of the pen will not do. And while the Trump administration has hit pause on the Supreme Court's decision, its next move must publicly confront the humanitarian

consequences of terminating DACA, and explain why it believes that termination of the program makes sense in light of the immense human and economic interests at stake. This includes the immediate, severe harm that such a decision would visit on the lives of hundreds of thousands of young people, their families and communities across the country.

Conclusion

As an executive action, DACA has always been subject to uncertainty due to a change in administration or litigation about Executive power. For that reason, Dreamers, activists, and lawyers, have been urging Congress for a permanent solution. Such a solution should not be controversial. Polls indicate that large majorities of Americans support DACA. What's more, for nearly two decades, both Democrats and Republicans have crafted versions of legislation that would offer immigrants who came here as children a path to citizenship. In short, there has always been, and will continue to be, a need for a permanent fix through legislation.

While the Supreme Court's historic decision offers hope and relief to the Dreamers and to the rule of law, it is not enough. For any reprieve to remain enduring, Congress must act. ■

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